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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of KHUE and
KIM-LIEN NGUYEN.

KHUE NGOC NGUYEN,

Appellant,

v.

KIM-LIEN HOANG NGUYEN,

Respondent.

D051966

(Super. Ct. No. D458947)

APPEAL from an order of the Superior Court of San Diego County, Lorna A. Alksne, Judge. Affirmed.

Khue Ngoc Nguyen (Khue) appeals a 2007 order granting in part the motion of Kim-Lien Hoang Nguyen (Kim) to set aside the 2000 judgment dissolving their marriage and dividing their community property. The court's 2007 order set aside the property division and spousal support portions of the judgment. On appeal, Khue primarily contends the trial court erred by granting that motion, because: (1) Kim's motion was

untimely filed under Family Code¹ section 2122, subdivisions (a) and (b); (2) the doctrine of laches bars Kim's motion; and (3) Kim did not carry her burden to show he committed actual fraud under section 2122, subdivision (a), or perjury under section 2122, subdivision (b).

FACTUAL AND PROCEDURAL BACKGROUND

In 1986 Khue and Kim were married. In 2000, while living in their Temecula home, they had a disagreement and separated. At that time, they also owned a house on Quince Street in San Diego. In or about April 2000, Khue filed a petition for dissolution of their marriage. On or about May 2, a copy of the summons and petition were served on Kim by mail. However, contrary to the proof of service, Kim did not receive copies of a blank response, preliminary declaration of disclosure, schedule of assets and debts, attachment 7J to the petition, and other documents. Based on their discussion regarding division of their property, Kim believed she would receive the San Diego property and Khue would receive the Temecula property.

In June 2000, Khue and Kim sold their home in Temecula and Kim moved to their San Diego house.² Khue deposited the proceeds from the Temecula sale (about \$73,000) in his separate bank account. On or about July 9, Khue opened an escrow account for the purchase of a four-unit rental property on Euclid Avenue in San Diego.

¹ All statutory references are to the Family Code unless otherwise specified.

² Title to the Temecula property apparently was transferred to the buyer on or about June 23, 2000. On or about June 26, Khue and Kim received an escrow check in the amount of \$73,493.30, representing the proceeds from that sale.

On July 19, Khue signed, under penalty of perjury, a declaration of community and quasi-community property (Declaration). On August 2, Khue filed the Declaration with the trial court in connection with the dissolution proceeding. In the Declaration, Khue stated that he and Kim owned real estate consisting of the residence in Temecula and the residence on Quince Street in San Diego. He completed each of the Declaration's remaining blank columns for other designated assets with n/a (i.e., not applicable), apparently representing they did not own any cash, bank accounts, retirement accounts, or other assets.³ In the Declaration, Khue proposed that their community property be divided by awarding him the Quince Street residence and Kim the Temecula residence.

On or about August 14, Khue deposited into the Euclid Avenue escrow account a cashier's check in the amount of \$82,504 (of which \$73,000 had come from the Temecula property sale proceeds). On August 16, the escrow closed in Khue's purchase of the Euclid Avenue property. He purchased that property for \$185,000, paying more than \$85,000 of that amount in cash.

On September 19 (after Khue's purchase of the Euclid Avenue property), only Khue appeared at the default hearing in their dissolution proceeding. When Kim received notice of the default hearing, she called Khue and asked him whether she needed to attend, and he told her she did not. On September 19, the trial court entered a judgment (Judgment) dissolving Khue and Kim's marriage effective as of November 18 and awarding the Quince Street property to Khue and the Temecula property to Kim. The

³ Kim believes they had between \$30,000 and \$50,000 in bank accounts at that time.

Judgment stated there were no retirement benefits or pension plans subject to disposition by the court. The Judgment did not award any spousal support.

In October 2000, Khue and Kim reconciled and Khue moved into the Quince Street house. He lived there with Kim until June 2006. While they lived together, Khue told Kim their divorce was "just a piece of paper" and that they continued to own everything "50/50."⁴

In March 2006, Khue asked Kim to sign a quitclaim deed for the Quince Street property to allow them to refinance its mortgage, explaining her credit was poor. He told her that her name would go back on the property's title after the refinancing. On June 10, 2006 (after the refinancing), Khue took about \$100,000 of the \$120,000 refinancing proceeds and left the country for three months. He did not put Kim's name back on the title to the Quince Street property.

In or about September 2006 (after Khue's return to the United States), he attempted to evict Kim and her family from the Quince Street property. Attached to the eviction notice was a copy of the Judgment. That was the first time Kim saw the Judgment. Prior to that time, she did not know Khue had obtained a judgment dividing their property and terminating her right to spousal support.

On October 24, 2006, Kim filed the instant motion to set aside the Judgment. Her motion requested that the trial court set aside the property division and spousal support

⁴ On or about September 20, 2002, Khue apparently sold the Euclid Avenue property for \$380,000 and purchased another rental property in Spring Valley for \$445,000.

portions of the Judgment on the grounds of Khue's perjury under section 2122, subdivision (b), and his fraud under section 2122, subdivision (a). On October 2, 2007, after considering the parties' pleadings, declarations, oral testimony, documentary evidence, and arguments, the trial court issued an order granting in part Kim's motion to set aside the Judgment.

Khue timely filed a notice of appeal.

DISCUSSION

I

Standard of Review

On appeal from an order setting aside a judgment in the dissolution of a marriage pursuant to section 2120 et seq., we review the trial court's decision for abuse of discretion. (*In re Marriage of Rosevear* (1998) 65 Cal.App.4th 673, 682-683; *In re Marriage of Varner* (1997) 55 Cal.App.4th 128, 138.) "Generally, where a trial court has discretionary power to decide an issue, an appellate court is not authorized to substitute its judgment of the proper decision for that of the trial judge. The trial court's exercise of discretion will not be disturbed on appeal in the absence of a clear showing of abuse, resulting in injury sufficiently grave as to amount to a manifest miscarriage of justice. [Citations.]" (*Marriage of Rosevear*, at p. 682.) "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479.) "A proper exercise of judicial discretion requires the exercise of

discriminating judgment within the bounds of reason, and an absence of arbitrary determination, capricious disposition, or whimsical thinking. A court must know and consider all the material facts and legal principles essential to an informed, intelligent, and just decision in the particular case before it. [Citations.]" (*Marriage of Rosevear*, at pp. 682-683.) The appellant bears the burden on appeal to show the trial court abused its discretion. (*Id.* at p. 682; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 331.)

II

Section 2120 Et Seq. Relief from Judgment Generally

"In 1993, a chapter entitled Relief From Judgment was added to the Family Code. (§§ 2120-2129; [citation].) The statutory scheme authorizes an action or motion to set aside a dissolution judgment on specified grounds, including fraud and perjury. (§§ 2122, 2125.)" (*Kuehn v. Kuehn* (2000) 85 Cal.App.4th 824, 830.) In section 2120, the Legislature stated its findings that:

"(b) It occasionally happens that the division of property or the award of support . . . is inequitable when made due to the nondisclosure or other misconduct of one of the parties.

"(c) The public policy of assuring finality of judgments must be balanced against the public interest in ensuring proper division of marital property, in ensuring sufficient support awards, and in deterring misconduct.

"(d) The law governing the circumstances under which a judgment can be set aside, after the time for relief under Section 473 of the Code of Civil Procedure has passed, has been the subject of considerable confusion which has led to increased litigation and unpredictable and inconsistent decisions at the trial and appellate levels."

Accordingly, the Legislature enacted section 2121 providing:

"(a) In proceedings for dissolution of marriage . . . , the court may, on any terms that may be just, relieve a spouse from a judgment, or any part or parts thereof , adjudicating support or division of property, after the six-month time limit of Section 473 of the Code of Civil Procedure has run, based on the grounds, and within the time limits, provided in this chapter.

"(b) In all proceedings under this chapter, before granting relief, the court shall find that the facts alleged as the grounds for relief materially affected the original outcome and that the moving party would materially benefit from the granting of the relief."

"Section 2122 sets out the exclusive grounds and time limits for an action or motion to set aside a marital dissolution judgment. Under this section, any action or motion to set aside such a judgment must be based on actual fraud, perjury, duress, mental incapacity, or mistake." (*In re Marriage of Rosevear, supra*, 65 Cal.App.4th at p. 684.) Section 2122 provides:

"The grounds and time limits for a motion to set aside a judgment, or any part or parts thereof, are governed by this section and shall be one of the following:

"(a) Actual fraud where the defrauded party was kept in ignorance or in some other manner was fraudulently prevented from fully participating in the proceeding. An action or motion based on fraud shall be brought within one year after the date on which the complaining party either did discover, or should have discovered, the fraud.

"(b) Perjury. *An action or motion based on perjury in the preliminary or final declaration of disclosure, the waiver of the final declaration of disclosure, or in the current income and expense statement shall be brought within one year after the date on which the complaining party either did discover, or should have discovered, the perjury. . . .*"⁵ (Italics added.)

⁵ For judgments that became or become final on or after January 1, 2002, section 2122, subdivision (f), also authorizes a trial court to set aside the judgment for "[f]ailure

Nevertheless, "a judgment may not be set aside *simply* because the court finds that it was inequitable when made, nor simply because subsequent circumstances caused the division of assets or liabilities to become inequitable, or the support to become inadequate." (§ 2123, italics added.)

III

Perjury under Section 2122, Subdivision (b)

Khue contends the trial court erred by setting aside the Judgment on the ground of perjury under section 2122, subdivision (b).

A

In granting in part Kim's motion to set aside the Judgment, the trial court found Khue "violated Family Code Sections 2122(a), 2122(b), 2122(f), and 2104" The court further found Kim's motion was filed in a timely manner under those statutory provisions, "which is within one year from the date [Kim] learned of the violations set forth above."

Although Khue did not request, and the court did not issue, a statement of decision, the court stated at the hearing on Kim's motion:

"[Khue] didn't comply [with section 2104's disclosure requirements]. Not only did he not comply, he lied on his disclosure documents. He stood in front of Judge Mason and said, 'Judge, give her a house that doesn't exist.' [¶] So the key question for the court is not whether or not he lied. We know that happened. We know he violated [section] 2122(a), (b) and (f). He violated [section] 2104. The question is

to comply with the disclosure requirements of Chapter 9 (commencing with Section 2100). . . ."

whether or not the court can set it aside because of the timeliness [of Kim's motion]."

The court then found Kim met her burden to prove her motion was timely filed. It found that when she received the eviction notice from Khue (in or about September 2006), she believed she owned the Quince Street residence. It found she lived there and had paid its mortgage. The court commented that Khue, in effect, had his cake and ate it too. Khue moved into the Quince Street residence (in October 2000) and nevertheless "walked away with all the [community] property." The court concluded: "[T]here was evidence that [Kim] didn't have any knowledge of the transaction [i.e., the Declaration and the Judgment]" It noted that "if [Khue] took the \$83,000 out of [a] community residence--it's a long-term marriage--and put it into a separate account and then bought properties and flipped them, [Kim has] a community interest in them." The court commented: "[T]his case shocks the court's conscience, and it's clearly violative of public policy, what happened in this case." Accordingly, the court set aside the Judgment's provisions regarding property division and spousal support.⁶

B

We conclude the trial court did not abuse its discretion by finding Kim met her burden to prove Khue committed perjury within the meaning of section 2122, subdivision (b). To the extent Khue challenges the trial court's express or implied findings on disputed facts, we apply the substantial evidence standard of review. (*Bickel v. City of*

⁶ The trial court did not set aside those provisions of the Judgment regarding dissolution of the marriage and child custody.

Piedmont (1997) 16 Cal.4th 1040, 1053, superseded by statute on another ground as noted in *DeBerard Properties, Ltd. V. Lim* (1999) 20 Cal.4th 659, 668.) There is substantial evidence to support findings that Kim believed, as part of their property division, she was to receive the Quince Street property and Khue was to receive the Temecula property. Kim moved into their Quince Street property in June 2000. On June 23, 2000, Khue and Kim sold the Temecula property and Khue deposited the sale proceeds (about \$73,000) into his separate bank account.⁷

On July 17, 2000, Khue, under penalty of perjury, signed the Declaration, representing that the community owned the Temecula property and the Quince Street property and did not own any cash or bank accounts. Furthermore, in the Declaration he proposed to the court that, as part of the dissolution judgment, Kim receive the Temecula property and he receive the Quince Street property. On August 2, Khue filed the Declaration with the court.

Based on our review of the record, we conclude there is substantial evidence to support the trial court's finding that Khue committed "perjury in the preliminary or final declaration of disclosure" within the meaning of section 2122, subdivision (b). As the court stated, Khue "lied on his disclosure documents" and it concluded that he violated section 2122, subdivision (b). Accordingly, Khue has not carried his burden on appeal to

⁷ To the extent Khue argues there is evidence to support a finding that Kim voluntarily loaned that amount to him and/or that such money/loan has since been repaid to her, he misapplies or misconstrues the applicable substantial evidence standard of review.

show the trial court abused its discretion by finding he committed perjury under section 2122, subdivision (b).

Likewise, Khue has not carried his burden on appeal to show the court abused its discretion by implicitly finding his perjury "materially affected the original outcome" and Kim "would materially benefit from the granting of the relief" within the meaning of section 2121, subdivision (b). The court found, in effect, that Khue's perjury in the Declaration resulted in the Judgment that allowed him to "[walk] away with all the [community] property." Had Khue truthfully disclosed in the Declaration all of the community property, the Judgment presumably would have been significantly different in its division of property. Therefore, there is substantial evidence to support a finding that Khue's perjury materially affected the original outcome of the dissolution proceeding.

Furthermore, there is substantial evidence to support a finding that Kim would materially benefit from the granting of the relief she requested in her motion. Kim's requested relief would void the Judgment's property division provision, thereby allowing her to challenge the one-sided nature of the Judgment's property division and, in subsequent proceedings, presumably obtain a more equitable division of community property after full disclosure of actual community property. Because the community did not own the Temecula property when the Judgment was entered, Kim was, in effect, awarded no property. Furthermore, as the trial court noted, "[I]f [Khue] took \$83,000 out of [a] community residence [i.e., from the sale of the Temecula property]--it's a long-term marriage--and put it into a separate account and then bought properties and flipped them, [Kim has] a community interest in them." Therefore, the court reasonably found, in

effect, that Kim would materially benefit were it to set aside the property division portion of the Judgment because she would receive some property rather than no property. Furthermore, the court could reasonably conclude full disclosure of the community property and the parties' income and expenses could also materially affect (to Kim's benefit) the Judgment's spousal support provision. We conclude the court did not abuse its discretion in finding Kim satisfied her burden to prove that section 2121, subdivision (b)'s requirements for relief were met.

C

Khue contends the trial court also erred by finding Kim's motion was timely under section 2122, subdivision (b). He argues that she discovered, or should have discovered, his perjury in the Declaration more than one year before she filed her motion. (§ 2122, subd. (b).) We conclude the trial court did not abuse its discretion by finding Kim's motion was timely filed. The court expressly found Kim filed her motion "within one year from the date [she] learned of" Khue's perjury under section 2122, subdivision (b). In granting her motion, the court also implicitly found that Kim should not have discovered Khue's perjury more than one year before she filed her motion. There is substantial evidence to support those findings. Kim testified that she did not learn about the Judgment (or its award of the Quince Street property to Khue) until she received Khue's eviction notice in September 2006. The record also supports the reasonable inference Kim did not participate in the 2000 dissolution proceedings that resulted in the Judgment after the default hearing on September 19, 2000. Although she admitted receiving a copy of the summons and dissolution petition, she did not receive a copy of

any preliminary or final declarations of disclosure. Furthermore, Khue told her she did not need to attend the default hearing and afterward told her their divorce was just a piece of paper. They resumed their relationship as husband and wife in October 2000 and continued that relationship until Khue left the country in June 2006. There is substantial evidence to support the court's finding that Kim did not actually discover Khue's perjury in the Declaration until 2006 when she filed her motion.

Likewise, there is substantial evidence to support the court's implied finding that Kim should not have discovered Khue's perjury until 2006. Based on Khue's conduct, the court could infer that a reasonable person in Kim's position would not have discovered, or taken actions to discover, his perjury in the Declaration. Because Kim believed, based on her discussions with Khue, their property would be divided so she would receive the Quince Street property and Khue would receive the Temecula property, the court could conclude that a reasonable person in her position should not have discovered that Khue, instead, committed perjury in the Declaration and proposed that she receive the Temecula property (previously sold and the proceeds of which sale Khue had received) and he would receive the Quince Street property. Given the nature of their relationship and the circumstances of their discussions, a reasonable person in Kim's position should not necessarily be charged with investigating whether Khue truthfully disclosed their community property and their proposed division of property. Although Kim did not seek the advice of an attorney or family or friends in connection with the dissolution proceeding, she was not, contrary to Khue's apparent assertion, required to do so to discover his perjury in the Declaration and thereby avoid the time limitation set forth in

section 2122, subdivision (b). Accordingly, we conclude the trial court did not abuse its discretion by concluding Kim did not discover, and should not have discovered, Khue's perjury in the Declaration until September 2006, and therefore her motion was timely filed under section 2122, subdivision (b).

D

Khue separately argues the trial court erred by granting Kim's motion because the equitable doctrine of laches applies based on her unreasonable delay in filing her motion. However, Khue does not cite, and we have not found, anything in the record showing he raised that defense in opposing her motion below. Rather, it appears Khue only argued Kim's motion was not filed within the one-year time limit of section 2122, subdivision (b). By not raising the equitable defense of laches below, we conclude he has forfeited that argument and cannot now raise it on appeal.

Nevertheless, to the extent he did not forfeit that defense or can otherwise raise it on appeal, we conclude the trial court would not have abused its discretion by concluding the equitable doctrine of laches should not be applied in the circumstances of this case. First, Khue does not cite, and we are not aware of, any case or other authority that states the equitable doctrine of laches can apply to bar a section 2122, subdivision (b) motion otherwise timely filed within the one-year time limit set forth in that statute. It is unclear whether a statutory right to relief (e.g., under section 2122, subdivision (b)) can be barred by an equitable doctrine like laches when its statutory time limit has not been exceeded. In any event, assuming *arguendo* the doctrine of laches could arguably apply to bar a

section 2122 motion in certain circumstances, we nevertheless conclude the trial court would not have erred by finding laches should not apply to bar Kim's motion in this case.

Based on our review of the record, the court found the equities in this case to clearly favor its award of Kim's requested relief. It found Khue lied in the Declaration, which resulted in the Judgment that gave her nothing. The circumstances in this case shocked the court's conscience. Furthermore, the same factors discussed above that support the court's finding of timeliness under section 2122, subdivision (b), also support a finding that Kim did not unreasonably delay in filing her motion. She was unaware of the Judgment and its division of community property until September 2006 when Khue served her with an eviction notice. In relying on her understanding of their agreement regarding division of their property and on Khue's assurance that she need not attend the September 2000 default hearing, Kim did not unreasonably delay her motion to set aside the Judgment until October 2006, shortly after she actually learned of the Judgment and its property division provisions. We conclude Khue has not carried his burden on appeal to show the equitable doctrine of laches necessarily precludes Kim's motion or that the court erred by not so finding.

E

As we concluded above, the trial court did not abuse its discretion in finding Kim's motion was timely filed under section 2122, subdivision (b), Khue's perjury materially affected the original outcome (i.e., the Judgment), and Kim would materially benefit from the granting of her requested relief. We now further conclude, based on our review of the record, the trial court did not abuse its discretion by granting the relief requested in Kim's

motion and setting aside the property division and spousal support provisions of the Judgment. The court was shocked by Khue's perjury and the resultant judgment that, in effect, awarded Khue all of their community property and awarded Kim nothing. In the circumstances of this case, *had* the trial court *denied* Kim's requested relief, we would likely have concluded it abused its discretion in so doing. Khue does not persuade us the court abused its discretion by granting Kim's requested relief after it found she met all of the requirements for relief under section 2122, subdivision (b). Contrary to Khue's assertion, the public policy of assuring finality of judgments did not in the circumstances of this case outweigh the public interest in ensuring proper division of marital property and sufficient support awards, and deterring misconduct. (§ 2120, subd. (c).) Likewise, contrary to Khue's apparent assertion, the trial court did not set aside the judgment merely because it was inequitable. (§ 2123.) Rather, it did so because of Khue's perjury in the Declaration under section 2122, subdivision (b), that resulted in the Judgment's inequitable division of property.

IV

Remaining Contentions

Because we concluded above that the trial court did not abuse its discretion by granting Kim's motion based on Khue's perjury under section 2122, subdivision (b), we need not address Khue's contentions that the court erred by granting her motion on the alternative grounds it cited. Accordingly, we do not address whether the court abused its discretion by finding Khue committed actual fraud under section 2122, subdivision (a), or

failed to comply with his disclosure requirements under section 2122, subdivision (f).⁸

The court's order setting aside the Judgment in part is independently supported by its finding that Kim met her burden to prove she was entitled to relief under section 2122, subdivision (b).

DISPOSITION

The order is affirmed.

McDONALD, J.

WE CONCUR:

BENKE, Acting P. J.

HUFFMAN, J.

⁸ We nevertheless note that section 2122, subdivision (f), does not apply to judgments that became final before January 1, 2002. (Stats. 2001, ch. 703, § 8.)